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No. 88-82

In the Supreme Court of the United States

OCTOBER TERM, 1988

STARRETT CITY ASSOCIATES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
DAVID K. FLYNN
WILLIAM R. YEOMANS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether petitioners violated the Federal Fair Housing Act, 42 U.S.C. 3601 *et seq.*, by imposing a quota system to limit indefinitely the number of minority tenants at a large apartment complex.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 840 F.2d 1096. The opinion of the district court (Pet. App. F1-F21) is reported at 600 F. Supp. 668.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1988. On June 29, Justice Marshall granted an extension of time to and including July 15, 1988, within which to file the petition for a writ of certiorari. The petition was timely filed on July 15, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners operate Starrett City, an extensive apartment complex located on 153 acres in Brooklyn, New York. It consists of 46 high-rise buildings containing 5,881

rental units (Pet. App. A3). The complex also houses two public schools, a recreational and community center, and a shopping center (*id.* at K2, K30).

The site was originally intended as a development of cooperative apartments, but the United Housing Foundation (UHF) abandoned that project in 1971 (Pet. App. A3). The Starrett Housing Corporation agreed to take over the project and to assume UHF's mortgage loan from the State of New York and the debt reduction contract with the United States Department of Housing and Urban Development (HUD) on condition that the development be a rental, rather than a cooperative, project (*id.* at A3, F3). In response to the community fear that the project would be all-minority (*ibid.*), the New York City Board of Estimate approved a tax abatement only upon the developer's assurance that it intended to create an integrated community (*id.* at A3-A4).

b. From the time the rental office opened in 1973 (Pet. App. A3), petitioners have based tenant selection on race and national origin to achieve and maintain occupancy percentages by apartment unit of approximately 64% white, 22% black, 8% Hispanic, 4.5% Oriental, and 2% other minorities (*id.* at A4, F6-F8).[1]

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[1] Applicants for apartments are sorted explicitly according to race. An applicant first completes a preliminary information card stating, among other things, his or her race and the size of the apartment sought. Those cards that pass preliminary screening based on income, employment, size of the apartment sought, and family size are placed in the active file, in which cards are segregated according to race and apartment size. Petitioners send applicants an acknowledgment letter stating that no apartments are available. Applicants then go through final processing, including income checks. When an apartment becomes available, it is offered to the first applicant in the final pool who is of the same race or national origin as the departing tenant (Pet. App. A4-A5).

This system for limiting minority tenants has continued notwithstanding a waiting list containing a far higher percentage of minority than white applicants. Thus, while blacks comprised 53.7% of the waiting list as of October 1985 and Hispanics made up 18%, they occupied only 20.8% and 7.9% respectively of the apartments (*id.* at A7). Meanwhile, whites occupied only 21.9% of the places on the waiting list, but occupied 64.7% of the apartments (*ibid.*). As a consequence, the quota system has required minorities seeking housing to wait a substantially longer period than whites. On average, for example, a black family can expect to wait ten times longer (20 months) for a two-bedroom apartment than a white family (2 months) (*id.* at F8).

2. a. In December 1979, a class of black plaintiffs filed suit against petitioners in the Eastern District of New York, alleging that petitioners' selection of tenants on the basis of race violated Title VIII of the Civil Rights Act of 1968, also known as the Federal Fair Housing Act, 42 U.S.C. 3601 *et seq.*, and state law (Pet. App. A5). Plaintiffs sought an injunction prohibiting the use of racial quotas in the allocation of apartments. See *Arthur* v. *Starrett City Assocs.*, 98 F.R.D. 500 (E.D.N.Y. 1983).

The parties reached a settlement in May 1984 that was embodied in a consent decree approved on April 2, 1985 (Pet. App. I1-I25). Petitioners agreed to make 175 additional units available to blacks and Hispanics over a five-year period (*id.* at A5), and the state housing authority (a co-defendant) agreed to promote housing opportunities for minorities (*id.* at I3). The decree expressly left unresolved the legality of petitioners' race-based tenant selection (*ibid.*).

b. The United States filed this action on June 28, 1984, alleging that petitioners' practice of denying apartments to minorities on the basis of race and national origin

violated the Federal Fair Housing Act (Pet. App. A5). Specifically, the government alleged that Starrett City committed violations of Section 804(a)-(d) of the Act, 42 U.S.C. 3604 (a)-(d), by limiting the number of apartments available to blacks, forcing blacks to wait significantly longer than whites for apartments, preferring white applicants while limiting the numbers of minority applicants accepted, and falsely representing to minority applicants that no apartments were available (Pet. App. A5-A6). The United States filed a motion for summary judgment, seeking to enjoin petitioners' allocation of apartments on the basis of race and national origin (*id.* at A6). Petitioners also moved for summary judgment (*ibid.*).

The United States District Court for the Eastern District of New York granted the government's motion for summary judgment and enjoined petitioners from further use of racial quotas in renting apartments (Pet. App. F20-F21). The court found that petitioners' rental practices substantially decreased rental opportunities for blacks and Hispanics (*id.* at F8), and that the practice thus violated the plain prohibition of Title VIII against discrimination based on race or national origin (*id.* at F16-F18). The court explained that neither prior precedent nor the statute's legislative history "[could] lawfully be interpreted to mean that * * * black[s] and other minority applicants who are qualified cannot obtain available apartments on an equal basis with whites but must remain subject to the landlord's quota" (*id.* at F17). It therefore concluded that "[d]efendants, as private landlords, were not empowered to establish quotas limiting the number of apartments to be made available to eligible minority applicants" (*id.* at F20).[2]

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[2] The court also stated that "[d]efendants were not authorized [by the statute] to treat the so-called 'tipping' phenomenon"—whereby

3. The court of appeals affirmed the judgment of the district court, holding that "the racial quotas and related practices employed at Starrett City to maintain integration violate the antidiscrimination provisions of the [Fair Housing] Act" (Pet. App. A10).

The court determined that Congress had enacted a strict anti-discrimination provision that it expected would eventually end segregation in housing. Thus, "[w]hile quotas promote Title VIII's integration policy, they contravene its anti-discrimination policy, bringing the dual goals of the Act into conflict" (Pet. App. A11). The court also concluded that the Act's legislative history does not resolve this conflict (*ibid.*). The court then looked to an analogous anti-discrimination provision, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to guide its determination of whether Starrett City's race-conscious quota system was permissible under the Federal Fair Housing Act. The court concluded from this Court's Title VII cases that any such program must be limited in duration (Pet. App. A12), and that it must be based on some prior history of discrimination "within the entity seeking to employ [the program]" (*ibid.*). It also stated that "programs designed to maintain integration by limiting minority participation, such as ceiling quotas, are of doubtful validity" (*id.* at A13 (citation omitted)).

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too many minority tenants would cause white tenants to leave and the complex to become all minority—"as a basis for denying minority applicants the same rights white applicants enjoyed" (Pet. App. F19). However, the court additionally pointed out that petitioners' "tipping" rationale was undermined by their willingness to increase the minority quota "when it became necessary to avoid litigating the private *Arthur* lawsuit which threatened their unlawful rental practices" (*ibid.*).

The court found that application of these principles required invalidation of petitioners' use of ceiling quotas. It noted that the quotas had already operated for ten years, and that there was little prospect that petitioners would abandon the quotas in the near future because the threat of white flight was unlikely to abate (Pet. App. A13). Second, it found no suggestion of prior racial discrimination or racial imbalance adversely affecting whites within Starrett City (*ibid.*). Finally, because petitioners' quotas operated as a ceiling on minority access to Starrett City, the court found that "the impact of appellants' practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities" (*id.* at A14). The court concluded, in sum, that "Title VIII does not allow appellants to use rigid racial quotas of indefinite duration to maintain a fixed level of integration at Starrett City by restricting minority access to scarce and desirable rental accommodations otherwise available to them" (*id.* at A16).[3]

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with the decisions of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

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[3] Judge Newman dissented, explaining that the Federal Fair Housing Act, enacted to combat segregation, should not be used to impede integration (Pet. App. A17-A28) and that the court was bound by *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), in which it found lawful under Title VIII a one-time, race-conscious allocation of rental units designed to promote integration (Pet. App. A27).

1. The issue raised by this case does not present an occasion for this Court to resolve a conflict with decisions of other courts of appeals or this Court, and the petition does not claim such a conflict exists. Indeed, the court of appeals' decision is the first to address the merits of the use of racial quotas that exclude minorities in order to maintain fixed racial percentages among tenants in an apartment complex.[4]

Nor, contrary to petitioners' suggestion (Pet. 11-12), is review required because of the pendency of numerous cases involving the same issue. We are aware of no similar cases pending in the courts of appeals and, as the petition indicates (*ibid.*), only two suits by the government challenging similar use of racial quotas to maintain integration are now pending in the district courts. Neither of these cases has been tried or decided. Accordingly, it is appropriate that this Court stay its hand.[5]

2. The court of appeals correctly held that Starrett City's use of rigid racial quotas over an indefinite period to

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[4] In *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (1973), the Second Circuit considered a challenge to a short-term, race-conscious allocation of apartments in an urban renewal project, and thus did not address the legality of an ongoing system of racial quotas to maintain integration. In any event, any intra-circuit conflict between *Otero* and the instant case does not warrant review by this Court.

[5] Contrary to petitioners' erroneous factual assertion (Pet. 5) that HUD has "[a]t all times" approved their use of racial quotas, the district court found that HUD "[s]trongly disavowed * * * Starrett's apparent assumption that HUD supported racially based tenant selection practices at Starrett City" (Pet. App. F16, quoting *United States* v. *Starrett City Assocs.*, 605 F. Supp. 262, 264 n.3 (E.D.N.Y. 1985)). Accordingly, the court of appeals' decision is not in conflict with the interpretation of the Federal Fair Housing Act by the agency charged with its administration.

maintain fixed percentages of minorities and whites at Starrett City discriminated against minorities in violation of the Federal Fair Housing Act.

a. Petitioners' conduct violates the plain language of 42 U.S.C. 3604(a)-(d) by making apartments unavailable to minorities on the basis of race, forcing minority applicants to wait significantly longer for apartments than whites, enforcing a policy that favors whites over minorities, and representing to minority applicants in acknowledgment letters that apartments are not available when they are. Indeed, petitioners concede (Pet. 8) that their practices violate the language of the Act, but contend that their denial of housing to blacks and Hispanics is justified because its purpose is not to force segregation, but to maintain integration by stemming "white flight." Petitioners therefore contend that an exception should be made to the Act's plain prohibition of discrimination when minorities are excluded from housing so that whites will not flee.

Such an exception, however, not only violates the plain statutory language,[6] but is directly at odds with the intent of Congress in passing the Act. Certainly Congress hoped to combat segregation, but it elected to do so by removing racial barriers—largely predicated on stereotypes concerning minorities—that prevented minorities from choosing

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[6] Of course, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). As Senator Mondale said, when asked about the meaning of the bill's declaration of policy: "Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean." 114 Cong. Rec. 4975 (1968).

freely where to live. The legislative history reveals Congress's belief that the gradual and inexorable breakdown of segregation could best be effected through measures that barred discrimination and insured minority persons' access to whatever housing they could afford. Thus, Senator Mondale, a principal sponsor of the legislation, stated (114 Cong. Rec. 3422 (1968)):[7]

> We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that. * * *
>
> * * * * *
>
> There will not be a great influx of all the Negroes in the ghettos into the suburbs—in fact, the laws of supply and demand will take care of who moves into what house in which neighborhood. There will, however, be the knowledge by Negroes that they are free—if they have the money and the desire—to move where they will; and there will be the knowledge by whites that the rapid, block-by-block expansion of the ghetto will be slowed and replaced by truly integrated and balanced living patterns.

It is precisely that freedom—to live wherever income permits—that petitioners' use of quotas denies to blacks and Hispanics.[8]

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[7] Because Title VIII of the Civil Rights Act of 1968 was offered as a floor amendment, the legislative history consists primarily of statements from the floor of the Senate and House of Representatives.

[8] Supporters emphasized repeatedly that the Act was designed to allow blacks and others to exercise their freedom to live wherever they could afford. See, *e.g.*, 114 Cong. Rec. 2275 (1968) (remarks of Sen. Mondale) ("the laws of economics will determine who can buy a house. All that legislation such as this would do would be to eliminate the discriminatory business practices which might prevent a person economically able to do so from purchasing a house regardless of his

It is, therefore, the principle of nondiscrimination, and not the end result of integration, that Congress enacted when it passed the Federal Fair Housing Act. As Senator Brooke, another principal sponsor, stated, "America's future must lie in the successful integration of all our many minorities * * *. That future does not require imposed residential * * * integration; it does require the elimination of compulsory segregation in housing." 114 Cong. Rec. 2525 (1968). Elsewhere, Senator Brooke stressed that "[a]s people are educated and have the opportunity and the wherewithal to move, they ought to be able to move" (114 Cong. Rec. 2282-2283 (1968)), and described the purpose of the Act as "giving the opportunity for people to live where they want to live and where they can live" (*ibid.*). In sum, as Senator Mondale stated, the Act "prohibits any discrimination on account of race, whether it is black, white, or whatever color it is." 114 Cong. Rec. 4974 (1968). Thus, petitioners' contention that Congress intended to permit them to *limit* minority access to housing turns the Federal Fair Housing Act on its head.[9]

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race"); *id.* at 5830 (remarks of Sen. Mansfield) ("As I envision the bill, we are concerned with removing a barrier which presently exists in our society for some Americans to exercise the right to live where their means will permit"); *id.* at 9570 (remarks of Rep. Hanley) ("I am going to vote for this measure because I believe that every American citizen has the right * * * to move freely * * * and to find * * * a place to live which he can afford"); see also *id.* at 2279 (remarks of Sen. Brooke); *id.* at 2528 (remarks of Senator Tydings); *id.* at 2708 (remarks of Sen. Hart).

[9] Petitioners suggest that the Act does more than command individuals to refrain from discrimination, since it directs the Secretary of Housing and Urban Development to administer that agency's programs "in a manner affirmatively to further the policies" of the Act (42 U.S.C. 3608(e)(5)). In response, we note first of all that the directive applies only to the Secretary. Secondly, this assertion only begs the question of what "the policies" of the Act are. Whether or not 42 U.S.C. 3608(e)(5) requires more than nondiscrimination, it is difficult

b. To justify their discrimination against blacks and Hispanics, petitioners argue that they must appease whites who will refuse to live at Starrett City with too many minorities. Petitioners' argument that their apartment complex will "tip" if blacks and Hispanics are not excluded blatantly caters to white prejudice. This Court has consistently rejected appeals to racial prejudice, disguised as laudable general policy objectives, as a valid basis for racial discrimination. See *Buchanan* v. *Warley,* 245 U.S. 60 (1917); *Palmore* v. *Sidoti,* 466 U.S. 429 (1984). In fact, petitioners maintain that an influx of minority tenants is itself undesirable because, they predict, it will lead to increased crime rates, vandalism, graffiti, increased nonpayment of rent, and a decline in educational achievement (Pet. 3; Pet. App. K87–K100). This is precisely the type of stereotyped thinking that Congress intended to eliminate from housing decisions by enacting the Federal Fair Housing Act.

As is apparent from this justification, petitioners' policies are in no way analogous to race-conscious affirmative action plans that courts have sometimes upheld as a means to increase opportunities for actual victims of discrimination or for members of groups disadvantaged by discrimination. See, *e.g., Steelworkers* v. *Weber,* 443 U.S. 193 (1979) (exclusion of blacks from skilled jobs);

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to see how a goal of eliminating housing discrimination against minorities is affirmatively advanced by permitting discrimination against minorities. Thus, while some courts have suggested that 42 U.S.C. 3608(e)(5) imposes on HUD a duty to consider the racial impact of its funding decisions, none have held that the duty itself is a limitless license to engage in long-term and burdensome discrimination against blacks and Hispanics in contravention of the clear prohibitions of the Act and its legislative history. See, *e.g., Anderson* v. *City of Alpharetta,* 737 F.2d 1530 (11th Cir. 1984); *NAACP* v. *Secretary of Housing & Urban Development,* 817 F.2d 149 (1st Cir. 1987).

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) (exclusion of minorities from public contracts); *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987) (exclusion of women from position of road dispatcher). Indeed, petitioners' selection program is the very opposite of affirmative action, since their refusal to rent apartments to blacks and Hispanics further *disadvantages* traditional victims of discrimination. Rather than promote minority access to housing, they place a ceiling on minority opportunity. Petitioners reserve apartments for whites while turning away minority applicants, thereby " 'singl[ing] out those least well represented in the political process to bear the brunt of a benign program.' " *Fullilove* v. *Klutznick*, 448 U.S. at 519 (Marshall, J., concurring) (quoting *University of California Regents* v. *Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in part and dissenting in part)). Petitioners' discrimination against blacks and Hispanics in favor of whites is the very type of discrimination that Congress intended to eliminate by enacting the Federal Fair Housing Act. There can be no doubt that the widespread adoption of private quotas to maintain a racial mix deemed ideal or desirable would significantly restrict minorities' housing opportunities and thus subvert the Act's goal to remove all race-conscious restrictions limiting minorities' housing choices.

c. Even if petitioners' quota system could properly be characterized as an affirmative action plan, it would nevertheless fail to meet additional criteria developed under Title VII for acceptable race-conscious conduct. There is no question that the quotas here are not grounded on evidence of prior discrimination or a "conspicuous imbalance" that disfavors the quotas' beneficiaries. The quotas thus are not, in any sense, remedial.[10] See *Johnson*

[10] As the plurality of this Court stated in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 276 (1986), "[s]ocietal discrimination,

v. *Transportation Agency,* slip op. 12-13; *Steelworkers* v. *Weber,* 443 U.S. 193, 208-209 (1979). Moreover, petitioners' selection system is indefinite in duration, rigid in application, and severely burdensome to innocent individuals. The limitation on minority access to Starrett City apartments has been in effect continously for ten years and "no definite termination date for Starrett's quotas is perceivable" (Pet. App. A13). Thus, petitioners' quota system does not satisfy the very stringent requirements of temporal limitation, flexibility, and minimal impact on excluded individuals that this Court has announced in the Title VII context with regard to those rare cases where a remedial preference may be permissible. See *Johnson* v. *Transportation Agency,* slip op. 20-22; *Sheet Metal Workers* v. *EEOC,* 478 U.S. 421, 475-479 (1986). Similarly, petitioners acknowledge (Pet. 10-11) that the aim of these quotas is not to attain, but rather to *maintain* a particular racial composition—an objective this Court has repeatedly rejected as inconsistent with Title VII. See *Johnson,* slip op. 21-22; *Sheet Metal Workers,* 478 U.S. at 475, 478; *Steelworkers* v. *Weber,* 443 U.S. at 208.

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without more, is too amorphous a basis for imposing a racially classified remedy." See also *Fullilove* v. *Klutznick,* 448 U.S. 448, 497 (1979) (Powell, J., concurring) ("this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
DAVID K. FLYNN
WILLIAM R. YEOMANS
Attorneys

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